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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE WESTERN MUSHROOM MARKETING ASSOCIATION, THE WASHINGTON APPLE COMMISSION, THE UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, THE CALIFORNIA AGRICULTURAL ISSUES FORUM, AND THE NORTHWEST HORTICULTURAL COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Western Mushroom Marketing Association, the Washington Apple Commission, the United Fresh Fruit & Vegetable Association, the California Agricultural Issues Forum, and the Northwest Horticultural Council respectfully submit this brief *Amici Curiae* in support of the Petitioner. This brief is presented with the consent of all parties. The required letters of consent are filed with this brief.[1]

INTEREST OF THE *AMICI CURIAE*

Amici submit this *amici curiae* brief in support of petitioner Secretary of Agriculture. Although this Court has found that generic agricultural research and promotion programs funded by mandatory assessments do not violate the First Amendment, the court below invalidated the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101, *et seq.* ("Mushroom Promotion Act") on the ground that it did not contain "heavy regulation . . . controlling price, supply and quality." *United Foods, Inc., v. United States*, 197 F.3d 221, 224-25 (6th Cir. 2000). *Amici* have vital interests in this matter because they are involved with mushrooms or other commodities that benefit from and participate in research and promotion programs authorized by federal and state laws that contain varying amounts of regulation, either within the authorizing legislation or affecting the commodity and its distribution. The *United Foods* standard regarding the extent of regulation to justify mandatory assessments to support the programs either directly or indirectly impacts these *Amici*.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this *Amicus Curiae* Brief. No other entity or person, aside from *Amici*, made any monetary contribution for the preparation or submission of this brief to this Honorable Court.

The Western Mushroom Marketing Association is a California nonprofit corporation whose purpose is to promote the sale and consumption of mushrooms. Its members are located in California, Colorado, Nevada, Oregon, Utah and Washington and range from small, family operations, growing 2-3 million pounds of mushrooms a year, to large corporate growers who grow approximately 50 million pounds of mushrooms a year. The members of this association grow mushrooms that are subject to the Mushroom Promotion Act that is the subject of the present action. Association members will be directly affected by the instant action.

The Washington Apple Commission[2] is a mandatory producer-funded agricultural commodity research and promotion program analogous to that at issue in the instant case. It operates under authority granted by the Washington Legislature. As such, it is uniquely situated to assist the Court in understanding the scope and structure of these programs and the importance of these programs to the agricultural economy.

The United Fresh Fruit & Vegetable Association is a national trade association for the fruit and vegetable industry. Its members include growers, packers, shippers and distributors of produce. The association's members produce and distribute agricultural commodities that are the subject of generic research and promotion programs that are analogous to the program at issue here.

The California Agricultural Issues Forum is an association of California commissions and boards that conduct generic agricultural research and promotion programs that are

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[2] Created in 1937 as the Washington State Apple Advertising Commission, Wash. Rev. Code § 15.24.010, the Commission is popularly known as the Washington Apple Commission.

analogous to that at issue in the instant matter.[3] The California Agriculture Issues Forum was formed for the purpose of creating an environment in which farmers can continue to compete and profitably produce food. The Northwest Horticultural Council is an association of marketing boards conducting programs similar to the program of the Mushroom Council, which is at issue here, as well as growers and shippers involved in those programs.[4] The Northwest Horticultural Council was formed with the broad purpose of addressing problems common to the Northwest produce industry.

These *Amici* are well situated to assist the Court in understanding the scope and structure of these programs and the importance of these programs to the agricultural economy. Accordingly, this brief is primarily devoted to a discussion of the types of activities engaged in by research and promotion programs, and the importance of these activities to the producers, consumers and the economy of the United States.

SUMMARY OF ARGUMENT

1. Mandatory research and promotion programs were enacted for the purpose of regulating agricultural commodities and, in accordance with *Wileman*, the First Amendment is not implicated by the mandatory assessments to support the activities of the Mushroom Council. Because the amount of regulation surrounding a generic advertising and promotion program does not change the regulatory

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[3] The members of the California Agricultural Issues Forum represent California growers of avocados, cantaloupes, cherries, citrus, peaches, kiwifruit, melons, pears, plums, prunes, raisins, strawberries, and table grapes.

[4] The Northwest Horticultural Council represents the interests of growers and shippers of apples, Bartlett pears, sweet cherries, winter pears, and other tree fruits grown in Idaho, Oregon and Washington.

purpose and effect of the program, the Sixth Circuit erred when it distinguished the mushroom order on the basis that it was not regulation and held it unconstitutional.

2. Generic agricultural research and promotion programs supported by mandatory assessments exist in many forms and cover a wide range of agricultural commodities. The activities engaged in by these programs share common goals: stabilizing the agricultural economy, promoting agricultural products, protecting consumer health, and preventing waste. These programs benefit producers, consumers, and the agricultural economy.

ARGUMENT

A. THE SIXTH CIRCUIT ERRED WHEN IT HELD THAT THE COURT MUST ASSESS THE REGULATORY SCHEME TO DETERMINE WHETHER IT CONTAINS AN APPROPRIATE NUMBER OF REGULATIONS

Amici agree with the solicitor general: that mandatory research and promotion programs were enacted for the purpose of regulating agricultural commodities; that the First Amendment is not implicated unless a research and promotion program restrains the freedom of a producer to communicate any message to any audience, compels a person to engage in any actual or symbolic speech, or compels the producer to endorse or finance any nongermane political or ideological views; and that without these restrictions or compulsions, assessments to support a generic agricultural research and promotion program are not speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-70 (1997).

Because the amount of regulation surrounding a generic advertising and promotion program does not change the regulatory purpose and effect of the program, the Sixth Circuit erred when it distinguished the mushroom order on the basis that it was not regulation. As with the tree fruit

orders in *Wileman*, the mushroom research and promotion program is demand-side regulation of the agricultural economy. *See United States v. Frame*, 885 F.2d 1119, 1126 (3d Cir. 1989). Research and promotion programs were passed to support and stabilize the agricultural economy by increasing demand for agricultural products. That these promotional programs use speech to achieve their regulatory ends does not prevent them from constituting economic regulation. Nor does the addition of price or supply controls alter the basic regulatory nature of these programs, even though they are more intrusive than mandatory assessments.

All of these generic research and promotion programs are consistent with the *Wileman* Court's conclusion that these program are "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Wileman*, 521 U.S. at 477. Therefore, Congress, state legislatures, government officials and market participants are correct in concluding "that such programs are beneficial." *Id.*

B. AN EXAMINATION OF RESEARCH AND PROMOTION PROGRAMS SHOWS THAT THEY ARE ECONOMIC REGULATION THAT PROMOTE THE HEALTH OF THE AGRICULTURAL ECONOMY

1. Research and Promotion Programs Exist in a Wide Range of Forms to Best Promote a Wide Range of Products

Generic agricultural research and promotion programs supported by mandatory assessments of the producers of the products affected, exist in many forms and cover a wide range of agricultural commodities. As of 1993, more than three hundred mandatory commodity research and promotion

programs were operating throughout the United States.[5] The combined budgets of these programs in 1993 was approximately $700 million.[6] The farm revenue derived from the commodities subject to the programs is in excess of $100 billion.[7]

These programs take a variety of forms and are created in a variety of ways. They may be authorized by statute granting federal or state secretaries of agriculture broad general authority to establish marketing programs under predetermined circumstances.[8] In other cases, the programs are created for specific commodities directly by act of the legislatures.[9] Under both circumstances, the statutes establish the structure of the program and typically direct the secretary to put the proposed program to an industry vote.[10] If the referendum establishes that the program has sufficient support in the industry, the program will be authorized. Once created, the program will typically include a board consisting of producers, handlers, or both, operating under government oversight.[11] The programs often include provisions for

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[5] O.D. Forker & R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* 81 (New York, Lexington Books 1993).

[6] *Id.*, 102-03, Table 5-1.

[7] W. Kinnucan, *Economics of Mandated Commodity Programs: An Overview and Guide to the Literature* 2 (1995).

[8] *Compare* The Agricultural Enabling Act of 1961 (Wash Rev. Code § 15.65) *and* The California Marketing Act of 1937 (Cal. Food & Agric. Code § 58601, *et seq.*) *with* Mushroom Promotion, Research and Consumer Information Act of 1990, as amended, 7 U.S.C. §§ 6101-6112; Wash. Rev. Code § 15.24.010, *et seq.* (Washington Apple Commission), Idaho Code § 22-1201, *et seq.* (Idaho Potato Commission); and Cal. Food & Agric. Code § 68001, *et seq.* (California Kiwifruit Commission).

[9] *See, e.g.*, Wash. Rev. Code § 15.24.010; Idaho Code § 22-1202.

[10] *See, e.g.*, 7 U.S.C. § 6105; Cal. Food & Agric. Code § 68091.

[11] *See, e.g.*, 7 U.S.C. § 6104; Cal. Food & Agric. Code §§ 68051-68052.

termination through a variety of mechanisms, including regular referenda, petition processes through which producers or handlers can force an interim referendum, and the secretary's individual power to terminate or suspend a program.[12]

Whether authorized by general statute, a commodity specific act of Congress or a state legislature, the programs are empowered to engage only in specific limited activities that vary from program to program. These activities typically involve: generic promotion to maintain and expand existing markets and open new ones; production research to increase efficiency and develop new and value added uses for the commodity; market research to identify opportunities and guide the promotion efforts; and, dissemination of consumer education information regarding handling requirements and nutritional qualities.[13]

2. The Activities of These Programs Achieve the Purpose Underlying Their Enactment: Promoting Agriculture, Protecting Consumer Health and Preventing Waste

All of the activities engaged in by these programs share common goals: stabilizing the agricultural economy, promoting agricultural products, protecting consumer health, and preventing waste. For example, in enacting the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*, Congress declared these programs necessary to prevent "disruption of the orderly exchange of commodities in interstate commerce [which] impairs the purchasing power of farmers and destroys the value of agricultural assets which

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[12] *See, e.g.*, 7 U.S.C. § 6105; Cal. Food & Agric. Code, §§ 68132, 68133.

[13] *See, e.g.*, 7 U.S.C. § 6104; Wash. Rev. Code § 15.24.070; Idaho Code § 22-1207; and Cal. Food & Agric. Code § 68081.

support the national credit structure." [14] In enacting the Agriculture Improvement and Reform Act of 1996, Congress further stated that "[t]he central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor." [15]

A review of the state authorized programs reveals that they too were enacted for an economic purpose. In adopting the act authorizing the Washington Apple Commission, the Washington Legislature provided that the Commission was necessary, in part, because stabilizing the apple industry, enlarging its markets, and increasing of consumption of apples are necessary "to stabilize and protect the apple industry of the state" and "to assure the payment of taxes to the state and its subdivisions, to alleviate unemployment within the state, and increase wages for agricultural labor." [16]

In the legislative enactment creating the Idaho Potato Commission, the State of Idaho cited a similar desire to make its industry more efficient and competitive in an expanding agricultural markets. The legislature explained that: " "[e]conomic" waste is being fostered in the potato industry of the state of Idaho by the lack of proper advertising and dissemination of information necessary for the development and promotion of the sale of potatoes grown in the state of Idaho." [17] Therefore, Idaho created the Potato Commission to expand the markets and increase consumption of potatoes.[18]

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[14] 7 U.S.C. § 601.

[15] The Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501 (b) (2), 110 Stat. 888.

[16] Wash. Rev. Code § 15.24.900(1), (6).

[17] Idaho Code § 22-1201.

[18] *Id.*

A nearly identical concern was expressed by the California Legislature in 1937 when it declared these programs necessary to "alleviate conditions which result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" and "prevent producers from retaining a fair return from their labor, their farms and the commodities which they produce." [19] The Legislature underscored this intent and reaffirmed the need for these programs in 1995 with the passage of Assembly Bill 1563 (1995 Cal. Stat. 727), which states that these programs "[a]re now more necessary and valuable than ever before as a result of declining support from the federal government and the increasing competition attributable to the global marketplace." [20]

These programs were also enacted to protect consumer health by ensuring the availability of fresh fruits, vegetables, meats and dairy products.[21] Marketing programs concern "not only the economic welfare but the health of the public in general." [22]

A well considered governmental plan to provide benefits to the nation and states, their people, and their economies, through expanding aggregate demand for, and consumption of, agricultural commodities underlies all of these programs. Congressional and legislative pronouncements regarding the need and desirability of mandatory commodity promotion and research programs, as the vehicle for implementing that plan,

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[19] Cal. Food & Agric. Code § 58651.

[20] Cal. Food & Agric. Code § 63901.

[21] *See, e.g.*, 7 U.S.C. § 6101(a)(1) (mushrooms); Cal. Food & Agric. Code §§ 58652, (The California Marketing Act of 1937), 61801 (milk), 65500 (table grapes); Wash. Rev. Code § 15.24.900 (apples).

[22] *Golden Cheese Co. v. Voss*, 230 Cal. App. 3d 547, 562, 281 Cal. Rptr. 587 (1991); *see also Nebbia v. People of State of New York*, 291 U.S. 502, 516-17 (1934) (milk).

echoes throughout the statutory enactments creating these programs.[23]

3. These Programs Promote the Agricultural Economy

One of the main activities engaged in by these marketing programs is promotion intended to increase demand in order to stabilize and absorb production. Promotion encompasses many types of activities, including international marketing, food service promotion, consumer education, and retail merchandising. It is well established that advertising increases demand for the product advertised.[24] Accordingly, advertising is one of the primary tools employed by these programs. Generic advertising has been described as "the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."[25]

Commodity marketing programs enable producers to pool their funds to promote their products.[26] This pooling of funds is necessary to generate benefits to the industry as a whole. For example, suppose that returns from a generic advertising program are $10 for each $1 spent and there are 500 equally small producers of a commodity. If an individual producer spends $10, the benefits to the industry will be $100, but since the benefits are distributed equally based on the amount sold, the individual producer gets a return of only

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[23] *See, e.g.*, 7 U.S.C. § 6101; Wash. Rev. Code § 15-24-010; Idaho Code § 22-1201; Cal. Food & Agric. Code §§ 68001-68005, inclusive.

[24] *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980).

[25] Forker & Ward, *supra*, at 2.

[26] *Id.* at 10.

$.20 for the $10 expenditure. Thus, the use of assessments from all producers of a commodity is necessary to ensure that the cost for the benefit, which is equally shared, is also equitably distributed. The sharing of costs through mandatory assessments avoids the "free rider" problem, which the U.S. Supreme Court found to be a vital government interest in the agency shop context.[27] As two noted commentators have stated:

> Commodity checkoff programs are a direct outgrowth of the potential free-rider problem. Commodity industries recognize the need to advertise their products but also recognize the need for everyone who benefits to pay their share of the program costs.

Forker & Ward, *Commodity Advertising*, *supra*, at 10.

The programs do more than advertising. Among other activities, these programs support research, either directly with their own staff or by contract, ranging from research regarding the commodities' health benefits to production methods that reduce pesticide use. These programs are also active in foreign marketing, such as opening new markets for domestic products and ensuring that established markets remain accessible. (*See* discussion regarding the California Table Grape Commission, *infra*, at C.3.)

Several recent econometric studies have been conducted to determine whether these programs provide measurable benefits for the agricultural economy. These peer-reviewed studies have demonstrated that the efforts of marketing boards and commissions have benefited producers and the agricultural economy. For example, a November 1997 study conservatively estimates net industry returns for the California Table Grape Commission's promotion program at

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[27] *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

five dollars for every dollar spent.[28] This shows that the programs can be very effective in terms of return to the growers for each promotional dollar spent, benefiting all growers by increasing demand for their products. Depending on the supply of the products, the increased demand may result in a higher price for a given harvest, or it may result in increased consumption at a constant or higher price. In either case, increased demand benefits an industry by increasing revenues.

Furthermore, studies indicate that the agricultural industry is negatively impacted when these programs are discontinued. In California, the almond promotion program was suspended from 1994 through 1997, providing a natural experiment for assessing the impact of the termination of these programs. A study of this period estimated that the accumulated loss to almond growers from the suspension was between $90 and $234 million dollars.[29]

C. THESE PROGRAMS HAVE UTILIZED MEANS SUITED TO THE NEED OF THEIR INDUSTRIES TO PROMOTE THE AGRICULTURAL ECONOMY BY INCREASING DEMAND

These programs are best understood in light of the types of activities they engage in and the benefits these activities bring to the industry. They go beyond just advertising. Their activities include programs for foreign marketing, opening new markets, ensuring that established markets remain accessible, helping to maintain a balance between production

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[28] Julian M. Alston, et al., *The California Table Grape Commission's Promotion Program: An Evaluation*, 77 (University of California, Giannini Monograph, No. 43, 1997).

[29] John M. Crespi & Richard J. Sexton, *Have Expenditures to Advertise California Almonds Been Effective?* 3 U.C. Davis Agric. & Resource Econ. Update 8 (2000).

and demand, and providing information that benefits the buying public and the producers. The following examples show how some promotion programs have used these means to provide the greatest benefit to their industry.

1. The California Walnut Commission and the California Walnut Marketing Board: Research and Promotion Working Together to Increase Consumption

Walnuts provide an example of how research and promotion can work together to increase consumption of a commodity.[30] In 1993, the California Walnut Commission [31] sponsored a study regarding the health benefits of walnuts that was published in the *New England Journal of Medicine*, showing that consumption of walnuts reduces blood

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[30] Walnuts are promoted through the joint efforts of the Walnut Marketing Board and the California Walnut Commission. The Walnut Marketing Board is a federal marketing order issued pursuant to the AMAA. 7 C.F.R. Part 984. The marketing order governs walnuts grown in California and promotes walnut use through research, promotion and education. *Id.*; *Walnut Marketing Board/California Walnut Commission*, *at* http://www.walnut.org/wmb.html. California Walnut Commission is authorized by statute. Cal. Food & Agric. Code § 77001, *et seq.* The Commission has a broad mandate regarding research and other activities but is authorized to engage in foreign marketing to expand the export markets for California-grown walnuts. Cal. Food & Agric. Code §§ 77090, 77095.

[31] The cotton industry has realized similar results through integrating research into its promotion programs. The Cotton Board conducts research and promotion programs under an order issued pursuant to the Cotton Research and Promotion Act, 7 U.S.C. § 2101, *et seq.* Industry funded research efforts undertaken by the Cotton Board turned around what many believed to be a dying industry. In the 1970's synthetic fabrics dominated the marketplace to the point that by 1975, cotton's retail share of the apparel and home fabric market was only 34%. By 1988, that share had increased to 51%, largely as a result of promotion based on research into fabric production. Forker & Ward, *supra*, at 122.

cholesterol levels.[32] Subsequent studies have confirmed these findings, indicating that eating walnuts can lessen the risk of heart disease by as much as 11%.[33]

Not surprisingly, the results of these studies have become a centerpiece in the program's marketing strategies, and the dissemination of these results have improved consumers' perception of walnuts as not only good to eat, but also good for their health. In July 1993 market research conducted throughout the United States revealed the significant impact of this research. In telephone interviews conducted in December 1992, 39% of those contacted described walnuts as being high in fat. Six months later, and three months after publication of the *New England Journal of Medicine* article, only 27% continued to believe walnuts were high in fat and fully 68% associated positive health attributes with walnuts.[34]

Given this trend, it is not surprising that none of those interviewed in December 1992 (before the article was published), who indicated they were buying more walnuts than they had in the past, listed health as a reason for the increase. By comparison, in June 1993 (after the study was published) 16% gave health as a reason for their increased consumption.[35]

These successful efforts on behalf of California's walnut producers provide an excellent example of how a mandatory commodity promotion and research program produced a significant consumer benefit and at the same time developed a powerful marketing tool to boost overall demand for the benefit of producers.

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[32] Joan Sabate et al., *Effects of Walnuts on Serum Lipid Levels and Blood Pressure in Normal Men*, New Eng. J. Med. (March 4, 1993).

[33] Walnut Marketing Board/California Walnut Commission, *Walnut Nutrition/ Nutraceutical Updates, at* http:/www.walnut.org/ loma.html.

[34] *California Walnut Tracking Study for USA*, (The Rose Organization, July 1993).

[35] *Id.*

2. The Washington Apple Commission: Geographic Identity Benefiting the Growers and the Agricultural Economy

The Washington Apple Advertising Commission, popularly known as the Washington Apple Commission, provides an example of how a program can assist in creating and maintaining a geographic identification with a product that benefit producers, the industry, and the overall agricultural economy in a state.

The Washington Apple Commission was created in 1937, when the act creating the Washington State Apple Advertising Commission was signed into law.[36] The Act requires the Washington Apple Commission to "conduct a comprehensive and extensive research, advertising and educational campaign as continuous as the crop, sales and market conditions reasonably require."[37] As early as 1947, independent surveys indicated that nearly 25% of the homemakers sampled said they preferred Washington apples for eating raw, and 16% said that they preferred Washington apples for cooking. Those surveyed did not mention apples grown in any other state or region.[38] Consumer recognition of Washington apples has continued to grow since the early days of the Commission. In interviews conducted in 1994 in Los Angeles, Washington, D.C. and Houston, nearly 50% of consumers interviewed perceived Washington apples as being more attractive, of better quality and crunchier than other apples. Three-quarters of those surveyed said that they were more likely to buy Washington apples in the future.[39]

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[36] Wash. Rev. Code § 15.24.010, *et seq.*; *see also* Washington Apple Commission, *About Us*, *at* http://www.bestapples.com/about-us.

[37] Wash. Rev. Code § 15.24.080.

[38] Washington Apple Commission, *Consumers Choose Washington*, *at* http://www.bestapples.com/apple-info/facts/consumers.asp.

[39] *Id.*

In light of these efforts, it is not surprising that the apple industry is a major source of revenue in Washington. Washington is the nation's largest apple producer. More than half of all apples grown domestically for fresh eating come from Washington. Washington is also the leading apple producing state in terms of total crop, growing more than 40% of the domestically produced apples.[40] Further, apples are Washington's most important agricultural commodity, with a value of $849.6 million in 1999.[41]

Econometric studies of the Apple Commission's programs confirm that the Apple Commission plays a major role in the health of this industry. The activities of the Washington Apple Commission between 1986 and 1991 produced a 12.9% higher market price than would have been realized without the program. This accomplishment represented a return of $133.76 million on an investment of $17.5 million, or $6.63 per producer dollar invested.[42] A recent study of the Washington Apple Commission's efforts to promote Fuji apples concluded that a $1.00 investment in the promotion of Fuji apples generates more than $6.00 in income per producer.[43]

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[40] Washington Apple Commission, *Washington Provides More Than Half of U.S. Fresh Apples, at* http://www.bestapples.com/ apple-info/facts/more.asp; Washington Agricultural Statistics Service, *Washington's Rank in the Nation's Agriculture, at* http://www.nass.usda.gov/wa.

[41] Washington Agricultural Statistics Service, *Top Forty Agricultural Commodities, Wa. at* http://www.nass.usda.gov/wa.

[42] O.D. Forker and R.W. Ward, *Commodity Checkoff Programs. A Self-Help Marketing Tool for the Nation's Farmers? Choices*, Fourth Quarter, 1993, 24.

[43] Timothy J. Richards & Paul M. Patterson, *New Varieties and the Returns to Commodity Promotion: The Case of Fuji Apples*, Agric. & Resource Econ. Rev., No. 29(1), 10-23 (Apr. 2000).

3. The California Table Grape Commission: Expanding the Sales of Table Grapes World-Wide

The California Table Grape Commission is an example of how a generic agricultural research and promotion program can expand and maintain markets for the benefit of its constituent growers. The Ketchum Act,[44] the statute authorizing the California Table Grape Commission, was passed at a time when the table grape industry was in serious decline. In 1968, when the Commission was formed, domestic per capita consumption of fresh table grapes had slipped to a twenty year low of approximately 1.7 pounds. In 1971, three years after the Commission was established, this trend reversed. By the early 1990s, with the Commission's assistance, domestic per capita consumption had more than tripled to approximately 6.5 pounds.[45]

In addition to achieving great success with its domestic promotional programs,[46] the California Table Grape

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[44] Cal. Food & Agric. Code §§ 65500 - 65675.

[45] Alston, *supra*, at 9-10.

[46] *Id.* at 77 (a study conservatively estimated that every dollar the Commission spent on promotion reaped a five dollar return for the industry).

The Table Grape Commission's participation in research programs has also benefited the industry. As just one example, since its inception approximately thirty years ago, the Commission has devoted more than $1.5 million on research to develop Integrated Pest Management and reduced-risk strategies for pesticide applications. *See* California Table Grape Commission, *Total Research Projects Index, 1972-2000, at* www.tablegrape.com/rev99/viticulture/ rsrcharchive/default.htm. These research efforts have been so valuable that in 1997, the Commission was the recipient of the "IPM Innovator" award from California's Department of Pesticide Regulation. *In Brief—Table Grape Commission Receives 'Innovator' Award*, Fresno Bee, Nov. 20, 1997, at C1; Richard T. Estrada, *Integrated Pest Control Finally Hot*, Modesto Bee, Nov. 14, 1997, at D1.

Commission has provided benefits through opening and expanding foreign markets. The Commission has been involved in export promotion since the late 1970s, with positive results. The trend in the quantity of table grapes exported was flat until 1987. Since then, exports have grown from between 200,000 and 250,000 pounds per year to over 400,000 pounds per year in the 1990s.[47] These results were achieved in part through the Commission's promotional efforts. Lack of consumer awareness in foreign markets has been a recurring barrier to the sale of California table grapes. Therefore, the Commission engages in promotional efforts to familiarize foreign consumers with table grapes, highlighting table grapes' nutritional value and other characteristics that increase their desirability. The Commission now has active promotion programs in more than twenty countries.[48] A study conducted by the United States Department of Agriculture (the "USDA") showed that the Commission promotion in targeted foreign markets resulted in a 27% increase in sales by volume. By comparison, foreign sales into non-targeted markets only increased by 9%.[49]

Another example is the opening of the China market. In an advisory capacity to the USDA, the Commission played an integral part in the negotiations that resulted in China opening its market to California table grapes. The Commission's efforts went beyond assisting in negotiations, and extended to implementing programs that were key to obtaining China's agreement. Before these efforts, China closed its borders to table grapes because of concerns over pests such as the Mediterranean fruit fly. The trade agreement with China required that the USDA perform monitoring to alleviate these

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[47] Alston, *supra*, at 57.

[48] *Id.* at 15.

[49] USDA, Horticultural & Tropical Products Division, *Grapes, World Production, Trade Statistics, & Market Information, at* http:/www.fas.usda.gov/htp/horticulture/grapes.html.

concerns, including additional Medfly trappings. The Commission agreed to implement and pay for the required programs. As a result of these efforts, in 1997 fresh table grapes became the first California commodity to gain access to Mainland China.[50] Similarly, the Commission assisted the USDA Foreign Agricultural Service in convincing the Korean government to establish a sulfur dioxide tolerance on table grapes. This paved the way for increased shipments of California table grapes to Korea, a significant new market for table grapes.[51]

The Table Grape Commission plays an active role in maintaining markets in Mexico. One of the difficulties in shipping to Mexico had been Mexico's complicated labeling requirements and inconsistent enforcement of those requirements. In large part due to the Commission's efforts, the Mexican labeling regulations were changed to impose the labeling requirements upon the Mexican importer rather than the United States shipper-exporter of table grapes. Partially as a result of the Commission's efforts, Mexico is now one of the largest markets for California table grapes.[52]

Further, in addition to the benefits achieved in Mexico, the California Table Grape Commission's promotional efforts in the Pacific Rim indicates that every $1 spent on export promotion generates benefits of $2, and that the benefit may be as high as $11 for every $1 spent.[53]

Several recent studies show that the Commission's efforts benefit California table grape growers in particular, and the California agricultural economy as a whole. A November

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[50] *See* Alston, *supra*, at 15.

[51] *Id.*

[52] *Id.*; *see also* The California Table Grape Commission, *Global Marketplace*, *at* http://www.tablegrape.com/index.htm.

[53] *Id.* at 78.

1997 study conservatively estimates net industry returns for the California Table Grape Commission's promotion program as five dollars for every dollar spent. The mid-range estimates provided by the study suggest that an extra one dollar promotion would generate benefits of over twenty dollars.[54]

4. The California Avocado Commission: Using Innovative Programs to Benefit the Industry

The California Avocado Commission[55] provides an example of how these programs use innovative programs to promote their commodities.

The Avocado Commission is also using new technologies to reach the avocado consumers. The Commission launched its web site, www.avocado.org in 1994. Since then, the traffic at the site has grown from a few visitors a day to more than 700,000 visitors a month.[56] The Commission uses this web site to reach out to avocado consumers. It sends email updates to the more than 24,000 people across the country who have registered to receive more information on California avocados. To encourage consumers to expand their use of avocados, it teamed up with gourmet restaurants in California to provide recipes that use avocados.[57] It has also launched a "Recipe Subscriber Program," a free service that emails a new avocado recipe to its subscribers each

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[54] *Id.* at 77.

[55] The California Avocado Commission is a research and promotion program created by the California legislature. Cal. Food & Agric. Code § 67001, *et seq.*

[56] The California Avocado Commission, *Trade News: Web Site Takes Avocado Marketing Into Cyberspace*, *at* http:/www.avoinfo.com/marketing/mark424.shtml.

[57] The California Avocado Commission, *Trade News: California Restaurants from North to South . . . , at* http://www.avoinfo.com/consumernews/cons72.shtml.

month.[58] The Commission has found that these efforts, together with other technologies such as database marketing, have increased available information regarding consumers' needs and enabled it to improve and target its promotion programs.

The California Avocado Commission's programs have had impressive results. On a short term basis, returns have typically averaged $5 to $6 for each dollar spent. The short term success of this program has caused new producers to enter the avocado industry, thereby increasing supply. The growth in the industry benefits the consumer by decreasing the price of avocados and benefits the state's economy as a whole by increasing overall revenues. Even though increased supply tends to decrease the price of avocados, the long term benefits to the individual producer have also been substantial. The average benefit-cost ratio per year over a 34-year period between 1961 and 1995 is $1.89 to $1, and the long-run ratio is $1.78 to $1. Further, if only the producers' share of the cost for the program funded through mandatory assessments is counted, the long-run ratio averages $2.84 to $1 across the 34 years.[59]

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[58] *Id.*

[59] Hay E. Carman & R. Kim Craft, *An Economic Evaluation of California Avocado Industry Marketing Programs* 1961-1995 96 (University of California, Monograph No. 344, July 1998).

CONCLUSION

Wileman establishes that unless a mandatory generic agricultural research and promotion program restrains the freedom of a producer to communicate any message to any audience, compels a person to engage in any actual or symbolic speech, or compels the producer to endorse or finance any nongermane political or ideological views, it is a species of economic regulation that does not violate the First Amendment. *Wileman*, 521 U.S. at 469-70. Nonetheless, in *United Foods*, the Sixth Circuit distinguished the mushroom order on the basis that it was not regulation. In so doing, the Sixth Circuit erred.

Mandatory research and promotion programs are economic regulation that promote agriculture and stabilize markets by increasing demand for agricultural commodities, showing that the legislature did not err when it concluded that these programs are beneficial. Accordingly, as in *Wileman*, the Court should defer to the determination of Congress, government officials and market participants, and reverse the decision below.

Respectfully submitted,

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